Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S1(S4)–22–484 OF 1998
ABDUL WAHAB PATAIL J
6 MAY 2009

Contract — Building contract — Breach — Termination by employer — Contractor disputing termination — Whether contractor could insist on holding on to and completing contracted works — Whether contractor could authorise subcontractors to enter construction site to remove equipment and materials — Employer's rights to re-enter site and carry on works — Contractor's rights purely in personam — Whether contractor's remedy only in damages if termination wrongful

Contract — Building contract — Termination — Contractor making application under s 176(10) of the Companies Act 1965 — Whether building contract automatically terminated

Contract — Damages — Assessment — Whether damages sufficiently proven — Damages claimed for wrongful loss and damage caused to construction site by subcontractors — Failure to identify which subcontractor responsible for each loss or damage — Whether claim for damages failed

Contract — Oral agreement — Proof of — Whether existence of oral agreement established — Burden of proof upon balance of probabilities

The plaintiff had let a contract to the first defendant for building works. The first defendant engaged the second, fourth and sixth defendants as its subcontractors ('the subcontractors') to carry out the works. The works were not completed despite an extension of the completion date. The first defendant then obtained an order pursuant to s 176(10) of the Companies Act 1965 ('Act') and the plaintiff terminated the first defendant's contract under cl 25(2) of the PAM Conditions of Contract. The termination was disputed by the first defendant. In the meantime the plaintiff engaged OB Builders Sdn Bhd as its main contractor to complete the works. The subcontractors alleged the plaintiff had requested them to carry on and

undertook to pay them, thereby creating a direct contract between the plaintiff and the subcontractors. The subcontractors claimed that acting on the plaintiff's promise, they had brought more material on to the site but were later told that OB Builders had been awarded the contract in place of the first defendant. The second to seventh defendants ('the defendants') then, without the consent or authority of the plaintiff or its architect, re-entered the worksite and allegedly removed and damaged the temporary buildings, plants, tools, equipment and materials, causing damages amounting to RM715,000. The architect certified that the sum payable by the first defendant to the plaintiff being the loss and/or damage caused by the determination was RM9,271,686.73. The plaintiff commenced this action claiming the aforementioned sums. The defendants/subcontractors counterclaimed against the plaintiff for loss and damages arising from the alleged direct contract between them. The issues arising for consideration were: (i) whether the first defendant could authorise the defendants to enter upon the worksite and remove their equipment and materials; (ii) what damage was caused by the defendants to the plaintiff; and (iii) whether an oral contract was created between the plaintiff and the counterclaimants.

Held, dismissing the claim and counterclaim with costs:

(1) The PAM Conditions of Contract is written with a clear distinction between ad rem and in personam rights, and it is clear to a fault that the contractor's rights are purely in personam. The first defendant's remedy was therefore in damages if the termination was wrongful, but no contractor can by disputing the termination, insist to hold on to and complete contracted works when the owner has decided not to continue the employment of that contractor (see para 24).

(2) It was clearly agreed that upon termination, the plaintiff can re-enter the site, to use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to and placed on or adjacent to the works to proceed to complete the works (see para 26).

(3) The act of the first defendant in making the application under s 176(10) of the Act automatically terminated its contract, and the purported termination by the plaintiff was not wrongful. Upon termination, the first defendant ceased to have the right to enter and remain upon the property or to authorise any person to do so. Whether the plaintiff physically took possession or not was immaterial. The defendants' reliance on the first defendant's authorisation was futile (see paras 28–29).

(4) The counterclaimants failed to discharge the burden that was upon them of proving upon a balance of probabilities that there were direct

A contractual obligations with them, and their counterclaim therefore failed. The defendants also failed to establish they had any right of entry independent of the first defendant. Since the defendants had failed in their defences that they had a right of entry, trespass had been proven against the second, third, fourth and fifth defendants (see paras 41 &
B 52).

(5) On the facts, the plaintiff had failed to identify which defendant was responsible for any particular missing, lost, damaged or destroyed items. Likewise as to the damage allegedly made. For this reason, the plaintiff's
C claim for damages failed (see para 53).

[Bahasa Malaysia summary

Plaintif telah memberikan satu kontrak kepada defendan pertama untuk
D kerja-kerja pembinaan. Defendan pertama melibatkan defendan-defendan kedua, keempat dan keenam sebagai subkontraktor-subkontraktor ('subkontraktor-subkontraktor') untuk menjalankan kerja-kerja pembinaan itu. Kerja-kerja itu tidak diselesaikan walaupun diberikan lanjutan tarikh siap. Defendan pertama kemudiannya mendapatkan perintah menurut
E s 176(10) Akta Syarikat 1965 ('Akta') dan plaintif menamatkan kontrak defendan pertama di bawah klausa 25(2) Syarat-Syarat Kontrak PAM. Penamatan tersebut dipertikaikan oleh defendan pertama. Dalam masa yang sama, plaintif mengupah OB Builders Sdn Bhd sebagai kontraktor utama untuk menyiapkan kerja-kerja itu. Subkontrak-subkontraktor menegaskan
F bahawa plaintif telah meminta mereka untuk meneruskan kerja dan berjanji untuk membayar mereka, dengan itu membentuk kontrak secara langsung antara plaintif dan subkontraktor-subkontraktor. Subkontraktor-subkontraktor mendakwa bahawa dengan bertindak atas janji plaintif, mereka telah membawa lebih banyak bahan ke tapak tetapi
G kemudiannya diberitahu bahawa OB Builders telah diberikan kontrak menggantikan defendan pertama. Defendan-defendan kedua hingga ketujuh ('defendan-defendan') kemudiannya, tanpa persetujuan atau kuasa plaintif atau arkiteknya, memasuki tapak kerja dan didakwa mengalihkan dan merosakkan bangunan-bangunan sementara, pokok-pokok, alatan-alatan,
H perlengkapan-perlengkapan dan bahan-bahan, mengakibatkan kerugian berjumlah RM715,000. Arkitek mengesahkan jumlah yang perlu dibayar oleh defendan pertama kepada plaintif atas kerosakan atau kerugian adalah sebanyak RM9,271,686.73. Plaintif memulakan tindakan ini menuntut jumlah tersebut. Defendan-defendan/subkontraktor-subkontraktor
I menuntut balas terhadap plaintif atas kerugian dan kerosakan yang dikatakan hasil daripada kontrak secara langsung di antara mereka. Isu-isu yang dikemukakan untuk pertimbangan adalah: (i) sama ada defendan pertama boleh memberikan kuasa kepada defendan-defendan untuk memasuki tapak kerja dan mengalihkan perlengkapan dan bahan-bahan mereka; (ii) apakah

kerosakan yang dilakukan oleh defendan-defendan kepada plaintif; dan (iii) sama ada kontrak lisan telah terbentuk antara plaintif dan penuntutbalas-penuntutbalas.

Diputuskan, menolak tuntutan dan tuntutan balas dengan kos:

(1) Syarat-Syarat Kontrak PAM ditulis dengan perbezaan yang jelas antara ad rem dan hak-hak in personam, dan adalah silap bahawa hak-hak kontraktor hanya in personam. Oleh itu remedi defendan pertama adalah dalam bentuk ganti rugi sekiranya pemecatan itu adalah salah, tetapi tiada kontraktor boleh dengan mempertikaikan pemecatan, bertegas meneruskan dan menyelesaikan kerja-kerja seperti yang dikontrakkan apabila pemilik telah membuat keputusan untuk tidak terus menggunakan tenaga kontraktor tersebut (lihat perenggan 24).

(2) Adalah jelas dipersetujui bahawa apabila kontrak ditamatkan, plaintif boleh memasuki tapak, untuk menggunakan kesemua bangunan-bangunan sementara, pokok-pokok, alatan-alatan, perlengkapan-perlengkapan, barang-barang dan bahan-bahan yang akan digunakan, dihantar kepada dan diletakkan pada atau bersebelahan dengan kerja-kerja dan terus menyelesaikan kerja-kerja (lihat perenggan 26).

(3) Tindakan defendan pertama dalam membuat permohonan di bawah s 176(10) Akta tersebut secara automatik menamatkan kontraknya, dan penamatan oleh plaintif adalah tidak salah. Apabila ditamatkan, defendan pertama tidak mempunyai hak untuk memasuki dan berada di atas harta atau memberi kuasa kepada sesiapa untuk berbuat demikian. Sama ada plaintif secara fizikal telah mengambil milik atau tidak adalah tidak material. Penyandaran defendan-defendan kepada kebenaran defendan pertama adalah sia-sia (lihat perenggan 28–29).

(4) Penuntutbalas-penuntutbalas gagal untuk melepaskan beban mereka untuk membuktikan atas imbangan kebarangkalian bahawa mereka mempunyai tanggungan-tanggungan kontraktual secara langsung, oleh itu tuntutan balas mereka telah gagal. Defendan-defendan juga gagal untuk membuktikan bahawa mereka mempunyai hak defendan pertama untuk memasuki secara bebas. Memandangkan defendan-defendan telah gagal dalam pembelaan mereka bahawa mereka mempunyai hak untuk memasuki, pencerobohan telah dibuktikan terhadap defendan kedua, ketiga, keempat dan kelima (lihat perenggan 41 & 52).

(5) Berdasarkan fakta, plaintif telah gagal untuk mengenalpasti defendan yang mana satu bertanggungjawab atas sebarang kehilangan, kerosakan

atau kemusnahan harta benda. Begitu juga dengan kerosakan yang dikatakan. Atas sebab ini, tuntutan plaintif untuk ganti rugi telah gagal (lihat perenggan 53).]

Notes

For a case on proof of oral agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4547.

For cases on assessment, see 3(1) *Malllal's Digest* (4th Ed, 2006 Reissue) paras 3240–3245.

For cases on breach of contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2763–2786.

For cases on termination of contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2922–2936.

Legislation referred to

Companies Act 1965 s 176, 176(10)

R Mohana Krishnan (Harvinderjit Singh with him) (Kumar Partnership) for the plaintiff.

MS Murthi (CP Mahendran with him) (RR Chelliah Brothers) for the defendants.

Abdul Wahab Patail J:

[1] Desa Samudra Sdn Bhd 'the plaintiff' commenced this action against the defendants for:

(1) special damages amounting to RM715,000 from all, or any of the defendants;

(2) the sum of RM9,271,686.73 from the first defendant;

(3) interest on the amount of special damages at the rate of 8%pa from 2 August 1998 until the date of full settlement;

(4) interest on the sum of RM9,271,686.73 at the rate of 8%pa from 26 June 1998 until the date of full settlement; and

(5) general damages and interest thereon at such rate as this court may determine.

[2] The first defendant, Autoways Construction Sdn Bhd, has since been wound up. Likewise the sixth defendant, Mitlon Hart Engineering Sdn Bhd. The seventh defendant, Choy Wai Kun, did not appear to defend himself.

[3] The defendants before the court are the second defendant, Bandar Teknik Sdn Bhd, the third defendant, Mr Phoon Kian Teong, the fourth defendant, Kinta Sejati Sdn Bhd and the fifth defendant, Lee Kai Seng ('the defendants'). A

[4] The plaintiff's remaining action against these defendants jointly and severally, is for special damages for entry upon the contract work site on, or about 2 August 1998 and allegedly converting the plaintiff's goods and equipment, as well as interest thereon at 8% from 2 August 1998 and costs. B

BACKGROUND C

[5] The contract was let by the plaintiff to the first defendant for earthworks, piling substructure and main building works. It is comprised in:

(1) a letter of award dated 25 September 1995 from NRY Architect; and D

(2) the PAM Standard Agreement and Schedule of Conditions of Building Contract (Without Quantities) as amended.

[6] The first defendant engaged the second, fourth and sixth defendants as its subcontractors to carry out and complete the works or part thereof, for the consideration and upon the terms and conditions agreed upon between these defendants. E

[7] The first defendant took possession of the site on 25 September 1995. The completion date was 24 May 1997. Pursuant to an application by the first defendant, the completion date was extended to 12 June 1997. On that date, a certificate of non-completion was issued. Problems continued until the plaintiff called for a meeting on 14 April 1998 to discuss the issue of the subcontractors payments. The defendants, who are sub-contractors to the first defendant, alleged that the plaintiff had requested the defendants to carry on and that the plaintiff undertook to pay them, thereby creating a direct contract between the plaintiff and the defendants. It was alleged there were about a hundred people there. The defendants claim that acting on the plaintiff's promise, they had brought more material on to the site but on 7 July 1998, were told that OB Builders had been awarded the contract in place of the first defendant. F G H

[8] When the first defendant on or about 22 May 1998 obtained an order pursuant to s 176(10) of the Companies Act 1965 in the High Court of Malaya at Shah Alam (Originating Summons No MT3–24–402 of 98), the plaintiff terminated the first defendant's contract on 25 June 1998 under cl 25(2) of the PAM Conditions of Contract. The termination was disputed by the first defendant. I

[9] In the meantime, the plaintiff engaged OB Builders Sdn Bhd as its main contractor to complete the work originally awarded to the first defendant. OB Builders Sdn Bhd took over the work site from 1 July 1998.

[10] On or about 2 August 1998, the second and seventh defendants, their servants or agents, and it is alleged, without the leave, licence, consent or authority of the plaintiff or its architect, re-entered the work site and allegedly removed, damaged and/or destroyed the temporary buildings, plants, tools, equipment, goods and/or materials and more particularly, set out in an annexed schedule, causing the damage claimed as special damages of RM715,000.00.

[11] On or about 29 June 2000, the architect certified that the sum payable by the first defendant to the plaintiff being the loss and/or damage caused by the determination is RM9,271,686.73.

THE CLAIM

[12] The plaintiff's claim arises from the defendants' entry upon the site on 2 August 1998 and requires the following to be considered:

(1) whether the frist defendant could authorise the defendants to enter upon the work site on 2 August 1998 and remove their equipment and materials; and

(2) what damage was caused by the defendants to the plaintiff.

[13] It is not disputed the plaintiff had notified the first defendant vide its solicitor's letter dated 26 June 1998 (see bundle B at p 258) that the latter's employment under the main contract was automatically determined pursuant to cl 25(2) of the PAM Conditions of Contract by reason that Autoways Construction was making a composition or arrangement with their creditors as evidenced by the order.

[14] It is not disputed as fact that on 26 May 1998, the first defendant disputed the termination.

[15] Entry upon the work site was not denied by the defendants. They nevertheless relied upon the authorisation from the first defendant to enter the work site to retrieve their equipment and materials. This is their first defence.

THE FIRST DEFENCE

[16] Since the plaintiff had terminated the contract with the first

defendant, the issue is whether by disputing the termination, the first defendant remained as main contractor and in possession of the work site. This concerns the application of cl 25(2).

[17] Clause 25(2) provides:

> (2) In the event of the Contractor becoming bankrupt or *making a composition or arrangement* with his creditors or having a winding up order made or (except for purposes of reconstruction) a resolution for voluntary winding up passed or a receiver or manager of his business or undertaking duly appointed, or possession taken by, or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the floating charge, the employment of the Contractor under this Contract shall be forthwith automatically determined but the said employment may be reinstated and continued if the Employer and the Contractor his trustee in bankruptcy liquidator receiver or manager as the case may be shall so agree.

[18] The material words affecting the first defendant by virtue of its application for restraining orders under s 176 of the Companies Act 1965 are '... *making a composition or arrangement with his creditors* ... '.

[19] Section 176(10) being resorted to is a power of the court to restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the court imposes. Such power is only justified by and was given to enable a company and its creditors to formalise a scheme of arrangement or compromise for the approval of creditors or members. That is plainly within the meaning of '... making a composition or arrangement with his creditors ...' in cl 25(2) above. The use of the word 'making' rather than 'made' makes it clear that cl 25(2) does not require that a composition or arrangement must first have come into existence. Upon the order under s 176 being made on 22 May 1998, the termination, forthwith and automatic had occurred. Whether the first defendant intended to formalise a scheme of arrangement, or compromise or not is irrelevant. Having applied for restraining orders under s 176(10), it is not open to the first defendant to say that he did not intend to and was not making a composition or arrangement with his creditors. The fact that no composition nor arrangement materialised, and that the first defendant was wound up does not change the fact that the power to make a restraining order under s 176(10) is for the sole purpose to facilitate making a composition or arrangement with creditors. The defendants were creditors of the first defendant. Even if the defendants did not want a composition or arrangement, and wanted to see the first defendant wound up, it does not

alter the fact that the first defendant's application was under s 176(10) which is to facilitate the making of a composition or arrangement with creditors.

[20] I will now examine how the termination comes into effect.

[21] The language used in cl 25(2) is '... the employment of the Contractor under this Contract shall be forthwith automatically determined ...'. The first defendant had agreed to language of not only 'shall', but also 'forthwith' as well as 'automatically'. There is no clearer or stronger language.

[22] The words following the foregoing, '... but the said employment may be reinstated and continued ...' means that the termination had occurred upon the happening of the events described in cl 25(2) and it is unnecessary for the owner to act to terminate the contract but that if at that point the owner wishes to continue with the same contractor, it is for him to reinstate and continue with the latter. As a standard basis agreement of a professional body, it is to keep the owner as its client in full control of his project. Since the termination occurs automatically upon his own act, there can be no challenge by the contractor to the termination.

[23] An interpretation that a contractor can maintain a status quo as contractor and continues to have the right possession if he disputes the termination or until he has handed over possession would defeat the purpose and intent of cl 25(2), and allow purported disputes to be used as a device to hold the property and through it, the owner to ransom, and architects in such circumstances, impotent.

[24] The PAM Conditions of Contract is written with a clear distinction between ad rem and in personam rights, and it is clear to a fault that the contractor's rights are purely in personam. The first defendant's remedy is therefore in damages if the termination is wrongful, but no contractor can by disputing the termination, insist to hold on to and complete contracted works when the owner has decided not to continue the employment of that contractor. In my view, the language of cl 25 was developed with the experience of and to effectively deal with purported disputes by contractors as to the termination by the contractors who seek to hold the work site and thus the employer to ransom unless he settles on the contractor's terms.

[25] The argument that a contractor ought to have, and remain in possession until he has accepted the termination and handed over the site because he has a contract and may have equipment and materials on site is clearly eliminated by cl 25(3)(a) which provides:

(3) In the event of the employment of the Contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the Employer and Contractor:

(a) The Employer may employ and pay other persons to carry on and complete the Works and he or they may enter upon the Works and use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to and placed on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works.

[26] It was clearly agreed, therefore, that upon termination having occurred, the plaintiff can re-enter upon the site, to use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to and placed on or adjacent to the works to proceed to complete the works.

[27] The testimony of DW5, the project manager of the first defendant that there was no surrender of the worksite and his reference to a letter in bundle B at p 263: 'we write to put on record that the employer has unlawfully occupied our site as on 27 June, 1998 by threat of force and removed our site staff and work force from the site' does not reflect the law and the agreement.

[28] This court holds that the act of the first defendant in making the application under s 176(10) of the Companies Act 1965 automatically terminated its contract, and the purported termination by the plaintiff was not wrongful if the first defendant continues as if it were not terminated. This court holds that upon termination the first defendant ceased to have the right to enter and remain upon the property or to authorise any person to do so. In law, termination had occurred on 22 May 1998 and as of that date, the first defendant ceased to have any right to possession of the work site. Whether the plaintiff physically took possession or not, is immaterial.

[29] The reliance by the defendants upon authorisation by the first defendant is thus futile, and their first defence must fail.

THE SECOND DEFENCE AND COUNTERCLAIM

[30] The defendants together with Centrepoint Building Material Sdn Bhd ('Centrepoint') and Kemajuan Aluminium (M) Sdn Bhd ('Kemajuan') counterclaimed against the plaintiff and Dato' Choo Keng Weng to seek

remedy for loss and damages. The sixth defendant having been wound up, and the third, fifth and seventh defendants not pursuing upon the counterclaim; only the second and fourth defendants with Centrepoint and Kemajuan remain. It is convenient in dealing with the counterclaim to refer to them as the counterclaimants.

[31] The second defence, being an argument for an independent right of entry, is incidental to their counterclaim. I will consider it's probability together with the counterclaim.

[32] The counterclaimants maintain that:

(1) on 14 April 1998, the plaintiff and Dato' Choo Keng Weng had agreed to pay them outstanding sums owed by the first defendant via the first defendant and requested them to mobilise and restart work, as a result of which they had brought materials on site;

(2) Dato' Choo Keng Weng gave a personal undertaking;

(3) a first payment was made on 22 April 1998, while the second payment was paid out on 23 May 1998 and 25 May 1998;

(4) based upon the promise, they brought the materials necessary to complete the project, and incurred additional costs on variation orders issued;

(5) they were summoned to a meeting on 7 July 1998 when the promise of 14 April 1998 was repeated but that they would be paid directly and further requested them to provide quotations for cost of work completed but not paid and cost to complete the remaining works; and

(6) they claim that Dato' Choo Keng Weng and the plaintiff reneged on those promises.

[33] Before 14 April 1998, the counterclaimants had no direct contractual relations either with the plaintiff or Dato' Choo Keng Weng. In respect of payments due to them, their remedy is a claim against the first defendant who was the main contractor.

[34] The question before the court is whether an oral contract was created on 14 April 1998 and whether it was reiterated on 7 July 1998. Such a finding is a finding of fact upon a balance of probabilities. It will necessarily consider the available oral testimony and contemporaneous documentary evidence relating to:

(1) the circumstances leading up to the meeting;

(2) the meeting itself; and

(3) the subsequent conduct of the parties.

[35] Having considered the lengthy testimony tested by extensive cross-examination, this court finds no reason to say that the plaintiff and Dato' Choo Keng Weng acted any different from any developer or owner in similar circumstances. Having already spent money on the development they wanted delays to be minimised, to be able to complete sales, halt liquidated damages on late delivery and interest charges, and close the project account.

[36] Discussions with the subcontractors in such circumstances would not for any altruistic reasons of alleviating the latter's hardships when unpaid by the main contractor, but to ensure they can continue work to completion. If the main contractor had already been paid, the subcontractors would be expected to deal with the main contractor for that part of their payments. If the main contractor had not been paid, the problem would be how to channel payments to reach the subcontractors. As stated by Dato' Choo Keng Weng funds was not the problem to the plaintiff. There is no evidence the plaintiff was in financial straits.

[37] In order to do so, it is necessary to know who amongst and for what, the subcontractors had not been paid, and the cost to complete the balance of their works. Such discussion does not necessarily mean direct contractual obligations have emerged and have been concluded. From the evidence before the court, this is effectively what was sought even on 7 July 1998. The counterclaimants label it as the plaintiff requested proposals. That description only makes it clearer there was no binding contract, but at best there was only a commitment made to accommodate the subcontractors.

[38] Given that by 1 July 1998 a new main contractor had taken possession of the site the probabilities therefore favour the conclusion that the plaintiff and Dato' Choo Keng Weng were on that date still exploring the alternatives to and of incorporating the subcontractors work under the new main contractor, and if that were not possible then to proceed with the new main contractor upon the latter's own arrangements as to subcontracting. It is therefore very unlikely that the plaintiff and Dato' Choo Keng Weng would be making commitments to the counterclaimants.

[39] Since the discussion on 7 July 1998 was at that stage, it is hardly likely that the meeting on 14 April 1998 had been more definitive as to any direct commitment. The meeting on 14 April 1998 was before the discovery of the s 176 application. The first defendant was still the main contractor. The plaintiff would more than likely be investigating from the subcontractors why there were delays, and if delays were caused by the main contractor not making payments, to look at ways to ensure payments do reach the

A subcontractors in the future. It could involve complications with other creditors of the first defendant, particularly if it is wound up. It was not a matter for instant decisions. Also, direct payments to the subcontractors involve complications to the main contract. Instant commitments are therefore impossible for this reason also.

B

[40] It is therefore improbable there were firm commitments made. The counterclaimant's action of obtaining authorisation from the first defendant to enter the site is clearly inconsistent with their argument they had a direct contractual right with the plaintiff and Dato' Choo Keng Weng.

C

[41] In short, the probabilities do not favour a finding that there were contractual obligations made directly with the defendants and counterclaimants. The court, therefore, finds that the defendants and
D counterclaimants have failed to discharge the burden that is upon them of proving upon a balance of probabilities that there were direct contractual obligations with them, and their counterclaim must therefore fail. With that the defendants and counterclaimants also fail to establish they had any right of entry independent of the first defendant.

E

LIABILITY

[42] As to entry and recovery of equipment and materials belonging to the counterclaimants, the defendants and counterclaimants cannot be unaware
F that the first defendant was under a contract with the plaintiff and that there was an owner's architect.

[43] Having been informed that the plaintiff had terminated the contract
G with the first defendant, the practical consequence is for the defendants and counterclaimants to deal with the plaintiff with regard to access to recover equipment and materials. Even if the termination is disputed by the main contractor, the prudent step was to obtain approval of the plaintiff or its architect rather than taking the side of the first defendant, and obtaining and
H acting upon the latter's authorisation rather than that of the owner or its architect.

[44] The obvious course would have been for the defendants and counterclaimants to prepare a list of equipment and materials each had
I brought to and remaining on site to the architect or the plaintiff so that the same may be verified and resolved.

[45] The defendants and counterclaimants could not have been under any misapprehension they cannot resort or appeal to the plaintiff directly for the

evidence shows they had resorted to seeking payment from the plaintiff as the owner when they were not paid by the first defendant.

[46] Instead in this case, the defendants and counterclaimants came on site on the same day. It cannot be coincidence. While the defendants' and counterclaimants' recourse is to the first defendant with whom they contracted, instead they purport to act upon authorisation by the first defendant. Even so, they entered the site only on 2 August 1998 even though they admit they have been informed of the termination on 26 May 1998.

[47] The defendants and counterclaimants acting on the same day more than two months after being informed of the termination testify loudly to a planned joint action. This, together with their complaint they had not been paid for their work, coupled with legal action against the first defendant being prevented by a restraining order, lends credence to the allegation that the defendants did not enter the site solely to recover their equipment and materials but in the process vent their dissatisfaction upon the owner.

[48] It was also submitted for the defendants that because the defendants and other subcontractors brought equipment and materials on site under their contract with the first defendant, the plaintiff cannot lay claim to their equipment and materials on the site. That argument can only be upheld if the defendants had made separate agreements with the plaintiff. In such case, their rights would be in accordance with their agreement with the plaintiff.

[49] In the absence of such agreement, their status remains as subcontractors seeking to claim rights through the main contractor. The presence and that of their equipment and materials on site are under the identity of the main contractor, who is therefore responsible for the subcontractors it brought in.

[50] The defendants and counterclaimants contracted solely with the first defendant. Without an agreement with the plaintiff, their sole authorisation to enter and bring equipment and materials on site is under the first defendant as the main contractor. In that event, their presence on site is as part of the first defendant and do not possess any identity on site independent of the first defendant. In such case, the terms of the main contract apply as if their equipment and materials were equipment and materials of the first defendant, and the first defendant's subcontractors remedy for payments including variations claims and retention sums, is against the first defendant only. It is no answer to claim that Dato' Choo Keng Weng had effectively taken the role of the first defendant. If he had, as submitted, practically stepped into the shoes of the first defendant, it does not make him or the

plaintiff liable but that he was acting for the first defendant. The first defendant would remain liable to those whose presence on site arise from subcontracts under it.

[51] Clause 14 of the contract between the plaintiff and the first defendant provides that unfixed materials and goods intended for, delivered to, and placed on or adjacent to the works shall not be removed for use upon the works unless the architect has consented in writing to such removal, which consent shall not be unreasonably withheld. There is no question of the first defendant having any right to self help by entering upon the site to take away materials and goods. The first defendant as contractor must obtain the consent of the architect to take out what it claims to be its equipment and materials and that includes equipment and materials of its subcontractors that it brought on site.

[52] Since the defendants have failed in their defences that they have a right of entry, the court finds trespass has been proved against the second, third, fourth and fifth defendants. This court also finds that even if the third and fifth defendants went to the site as representatives of the second and fourth defendants, they had nevertheless trespassed albeit on behalf of the second and fourth defendants who may have to compensate the third and fifth defendants.

[53] The plaintiff had produced a list of items missing, lost, damaged or destroyed. This court accepts the submission by counsel for the defendants that the plaintiff had failed to identify which defendant is responsible for any particular missing, lost, damaged or destroyed item. This court holds that the plaintiff has failed to prove which of the 156 had been taken by whom amongst the second, third, fourth and fifth defendants only. Likewise, as to the damage allegedly made. For this reason, the paintiff's claim for damages must fail.

[54] To summarise, the claim and counterclaim are dismissed with costs.

Claim and counterclaim dismissed with costs.

Reported by Kanesh Sundran